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Supreme Court of the United States

October Term, 1974

No. 73-1393

JOEL S. WHETSTONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JOEL S. WHETSTONE,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which refused to consider whether the Military Selective Service Act unconstitutionally discriminates against men on the basis of their sex on the grounds that Petitioner had not raised this issue before his local board or before the District Court.

Opinions Below

The decision of the Court of Appeals is not yet reported. It is set out in the Appendix, *infra*, at p. 13. The decision of the District Court is likewise unreported and is set out in the Appendix at p. 14.

Jurisdiction

The judgment of the Court of Appeals was entered February 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the decision of the Court below, holding that Petitioner's failure to challenge the constitutionality of the Military Selective Service Act before the local board and/or District Court precluded Petitioner from raising this issue on appeal, is in conflict with this Court's opinion in *Chapman v. California*, 386 U.S. 18, and should be remanded to the Sixth Circuit to consider the constitutionality of the Act.

Statement of the Case

The single legal issue presented in the Sixth Circuit Brief For Petitioner was whether this Court's opinion in *Ehlert v. United States*, 402 U.S. 99, was applicable where the local board considered and rejected a registrant's post-induction conscientious objector claim without a statement of reasons. On November 12, 1973, this Court in *Musser v. United States* and *Waldron v. United States*, both reported at 94 S.Ct. 196, held that *Ehlert* was applicable to a post-induction conscientious objector claim considered by the

local board. Both the Petitioner and the Government agreed that *Musser* and *Waldron* controlled the issue raised in Petitioner's Brief.

Petitioner in his Sixth Circuit Reply Brief argued that under another recent case, *Frontiero v. Richardson,* 411 U.S. 677, the Military Selective Service Act, as amended, was unconstitutional in that it discriminated on the basis of sex. Petitioner unsuccessfully argued to the Court below that he had the right to challenge the constitutionality of the Military Selective Service Act for the first time on appeal under F.R.Crim.P. 52(a). For the reasons set forth in this Petition For A Writ Of Certiorari, Petitioner respectfully submits that the judgment of the Court below should be reversed, and remanded to the Sixth Circuit for consideration of the constitutionality of the Military Selective Service Act.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision of the Court below, holding that Petitioner's failure to challenge the constitutionality of the Military Selective Service Act before the local board and/or the District Court precluded Petitioner from raising this issue on appeal, is in conflict with this Court's opinion in *Chapman v. California*, 386 U.S. 18.

Four members of this Court (Justices Brennan, Douglas, White and Marshall), held in *Frontiero v. Richardson*, 411 U.S. 677, that sex was a suspect classification:

> At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage and national origin, are inherently suspect and must therefore be subject to close judicial scrutiny. We agree . . . (*Id.* at 682) . . . We can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny. (Footnote omitted) 411 U.S. at 688.[1]

Significantly, eight justices of this Court held that the unanimous opinion in *Reed v. Reed*, 404 U.S. 71, controlled *Frontiero*, in apparent recognition that *Reed v. Reed* was a departure from the "traditional rational basis analysis with respect to sex based classifications . . ." 411 U.S. at 684.[2]

---

[1] *Frontiero v. Richardson* was filed two months *after* the District Court's opinion in the case *sub judice*, thus providing an "exceptional circumstance" justifying Appellate review of a question not raised in the Court below. *Blonder-Tongue v. University Foundation*, 402 U.S. at 313, 320-21 n.6.

[2] In *Reed* this Court held: "To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said

(Footnote continued on following page)

The question Petitioner attempted to present to the Sixth Circuit was whether under *Frontiero v. Richardson* the Military Selective Service Act is constitutional.

The federal interest that the Government has in making only men and not women subject to the Military Selective Service Act is non-existent. In fact, in every recent congressional study, it has been concluded that the Government's interest in achieving a strong and efficient military would be enhanced, not hindered, by more women in the military.

For example, in the Report to the President and the Chairmen of The Armed Services Committee of the Senate and of the House of Representatives (P.L. 92-129) entitled "Progress In Ending The Draft And Achieving The All-Volunteer Force," (August, 1972) it was concluded by the former Secretary of Defense, Melvin Laird, that "Many support-type jobs now filled by military men can be performed effectively and economically by civilians and military women." (pages 32-33). Shortly thereafter, in a report entitled "Problems In Meeting Military Manpower Needs In The All-Volunteer Force" (B-177952) the Comptroller General of the United States concluded:

> Increased enlistment of servicewomen offers a way to substitute the recruitment of mental category I to III female personnel for the recruitment of male military personnel. . . . A recent research study estimated that, of about 1.1 million women who enter the labor force each year, about 770,000 could pass the physical examinations. Of these, about 580,000 are mental category III or better and about 433,000 are high school graduates. (pages 50-51).

(Footnote continued from preceding page)
as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

By providing dissimilar treatment for men and women who are thus similarly situated the challenged section violates the Equal Protection Clause." 404 U.S. at 76-77.

More recently in a Report prepared by the Brookings Institute for the Committee on Armed Services, United States Senate Ninety-Third Congress (June 1, 1973) it was noted that "about 73 percent of the jobs in the defense establishment are open to women" as follows:

> Two questions merit attention. First, what jobs can be done by women? Second, how many women would volunteer if given the opportunity?
>
> Past restrictions on the use of women in most military occupations have recently given way under growing social pressures. Based on reassessments of assignment policies, the proportion of job specialties now open to women are as follows: Army, 89 percent; **Navy, 100 percent; Marine Corps, 36 percent;** and the Air Force, 98 percent. The average for all armed forces is 81 percent.[2] Actual jobs open to women, however, are restricted by laws which bar women from assignment to duty in naval combat aircraft or vessels. Army and Air Force policies also preclude women from combat-oriented specialties. Though combat is not clearly defined, one estimate of the proportion of combat jobs per service is: Army, 30 percent; Navy, 38 percent; Marine Corps, 32 percent; and Air Force, 12 percent.[3] Overall, about 73 percent of the jobs in the defense establishment are open to women. **(pages 47-48).**

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[2] Central All-Volunteer Force Task Force, "Utilization of Military Women (A Report of Increased Utilization of Military Women FY 1973-1977)" (Office of the Assistant Secretary of Defense [Manpower and Reserve Affairs], December, 1972; processed), p. 25.

[3] Assuming women would be restricted from holding jobs in a unit whose primary mission is to fire at the enemy. For the Army and Marine Corps, it includes combat battalions; for the Navy, combat ships; and for the Air Force, combat aviation units at squadron level. See Department of Defense, "Military Manpower Requirement Report" (Department of Defense, February 1973; processed), p. 77.[3]

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[3] Also see Statistical Abstract of the United States, p. 260 (1970) (Bureau of the Census, U.S. Department of Commerce), which illustrates that few military personnel engage in combat:

(Footnote continued on following page)

Clearly, the Federal Government's interest in promoting the military services would have been accomplished by including, not excluding, women from being subject to the Military Selective Service Act, as the above reports demonstrate.

The majority of this Court in *Frontiero* was influenced by the fact that "Congress has itself concluded [By passage of Title VII of the Civil Rights Act and the ERA] that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of government is not without significance to the question presently under consideration." 411 U.S. at 687-88.

Significantly, not only has Congress "concluded that classifications based upon sex are inherently suspect" but has rejected amendments which would exempt women from compulsory military service. The Equal Rights Amendment (hereinafter designated "ERA") was adopted by the Senate in March, 1972 and by the House of Representatives in October, 1971.[4] This Amendment to the United States Constitution states:

(Footnote continued from preceding page)

Occupational Group	*Percentage Distribution 1967*
Ground Combat	14.1
Electronics	14.7
Other Technical	7.7
Administrative and Clerical	18.4
Mechanics and Repairmen	26.1
Craftsmen	6.8
Services	12.0

It should also be noted that other countries such as Israel, Cambodia, and Thailand have found women to be as capable as men in the military.

[4] H.R. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. 35781 (1971); Res. 8, 92d Cong., 2d Sess., 118 Cong. Rec. S 4162 (daily ed. March 22, 1972). The House approved H.R.Res. 208

(Footnote continued on following page)

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

The Legislative history of that Amendment reveals that Congress addressed itself to the problem of requiring military service, particularly combat duty, for women. Senator Ervin in the Senate and Representative Wiggins in the House, attempted to guarantee, through amendments to the ERA, that passages of this Amendment would not affect the right of Congress to bar women from conscription. After lengthy debate in both chambers during which Senators and Representatives addressed the issue of compulsory military service for women, the Ervin and Wiggins[5] Amendments were soundly defeated.[6]

On March 21, 1972, Senator Ervin introduced two amendments expressly limited to the exclusion of women from military service:

> Amendment No. 1065 to the ERA read:
>
> SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. This article shall not impair, however, the validity of any laws of the United

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(Footnote continued from preceding page)
in its original form by a vote of 354-23. 117 Cong. Rec. 35815 (1971). The Senate debated the issue in March, 1972 and approved the joint resolution by a vote of 84-8. 118 Cong. Rec. S 4612 (daily ed. March 22, 1972). The Amendment has been submitted to the states for ratification.

[5] The Wiggins Amendment to the ERA read, *inter alia*:
SECTION 2. This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service. 117 Cong. Rec. 35783 (1971).

[6] The debate on the ERA in the House is found at 117 Cong. Rec. 35781-35815 (1971). The vote defeating Rep. Wiggins Amendment was 265-87. The debate on the ERA in the Senate is found at 118 Cong. Rec. S 4372-4409 (daily ed. March 21, 1972).

States or any State which exempt women from compulsory military service. 118 Cong. Rec. S 4374 (daily ed. March 21, 1972).

This amendment was defeated 73-18. 118 Cong. Rec. S. 4394. (daily ed. March 21, 1972).

Amendment No. 1066 to the ERA read:

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. This article shall not impair the validity, however, of any laws of the United States or any State which exempt women from service in combat units of the Armed Forces. 118 Cong. Rec. S 4395 (daily ed. March 21, 1972).

This amendment was defeated 71-18. 118 Cong. Rec. S 4408 (daily ed. March 21, 1972).[7]

Accordingly, it is difficult, if not impossible, to reconcile the legislative history and passage of the ERA with any compelling governmental interest furthered by the exclusion of women from the draft. Specifically, the votes and debate on the Wiggins and Ervin Amendments to the ERA indicate that the Congress does *not* view exclusion of women from conscription as either compelling or necessary.

Like our other Governmental powers, the war power is subject to constitutional restraints. In *Hamilton v. Kentucky Distillers & Warehouse Company*, 251 U.S. 146, 156 this Court reiterated that "The war power of the United States, like its other powers . . . is subject to applicable

[7] The Third Ervin Amendment to the ERA, introduced on March 22, 1972, read, *inter alia*:

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service. 118 Cong. Rec. S 4552 (daily ed. March 22, 1972).

constitutional limitations." The opinion in *Hamilton* was founded upon the unassailable bedrock of *Ex parte Milligan,* 18 L.Ed. 281 where this Court, in considering the effect of the Civil War upon this free society, held;

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. 18 L.Ed at 295.

More recently, in *United States v. Robel,* 389 U.S. 258, 263-264 this Court held:

> [T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'

Nor does the Robel case, striking down a federal statute prohibiting communists from working at "defense facilities" stand alone for the proposition that federal courts will enforce the limits of the Constitution upon legislative or executive action taken pursuant to the war power. See, *e.g., Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 and *New York Times v. United States,* 402 U.S. 813.

However great the need for a standing army, it must rest with the Government to show that conscription of men only (not women) is necessary to fill that need. It is no defense of a statute that, in seeking a legitimate and desirable end, Congress chose a convenient but unconstitutional means.

Rule 52 of the Federal Rules of Criminal Procedure provides *inter alia:*

> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Appellant respectfully submits that the constitutional issue he raised in his Sixth Circuit Reply Brief was properly before the Sixth Circuit under Rule 52(b) of the Federal Rules of Criminal Procedure.[8] *Quaid v. United States,* 386 F.2d 25, 27 (10th Cir. 1967); *Howze v. United States,* 409 F.2d 27, 28 (9th Cir. 1968); and *United States v. Bowen,* 414 F.2d 1268, 1273 n. 11 (3d Cir. 1969).

In *Chapman v. California,* 386 U.S. 18, 24, this Court held:

> . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

A fortiori, before a Defendant may be convicted the Court should be able to declare beyond a reasonable doubt that the statute he is charged with violating is constitutional.[9]

In light of the above discussion of the Military Selective Service Act, it is respectfully submitted that the Sixth Circuit's decision not to consider the constitutionality of the Military Selective Service Act is in conflict with this Court's opinion in *Chapman.*

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[8] Compare *Musser v. Utah,* 333 U.S. 95, 96, *Abel v. United States,* 362 U.S. 217, 219 and *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 320-21 n.6 where this Court *sua sponte* raised constitutional issues not even raised by counsel in the Courts below.

[9] In *United States v. Baird,* 427 F.2d 521 (6th Cir.) *cert. den.* 400 U.S. 866, cited by the Sixth Circuit, the issue of the right to counsel before the local board that was raised for the first time on appeal had been decided by a number of circuit courts, and therefore, the Court's refusal to consider that issue would not have affected the Defendant's "substantial rights" within the meaning of F.R.Crim.P. 52(a).

Conclusion

In light of *Reed v. Reed* and *Frontiero v. Richardson*, there is a serious argument that the Military Selective Selective Service Act by providing "dissimilar treatment for men and women who are . . . similarly situated" *Reed, supra,* 404 U.S. at 77, is unconstitutional. Petitioner respectfully requests this Court to grant his Petition For A Writ Of Certiorari and remand this case to the Sixth Circuit for consideration of this issue.

Respectfully submitted,

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Opinion of the United States Court of Appeals

NO. 73-1949

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOEL S. WHETSTONE,
Defendant-Appellant.

ORDER

Before: Edwards, Celebrezze and Engel, Circuit Judges.

On receipt and consideration of the briefs, the record, and the oral arguments in the above-styled case, the judgment of the District Court is affirmed. *See Mussser v. United States,* ____ U.S. ____ (1973), 14 CRIM. L. REP. 1408 (U.S. November 12, 1973) (*Per Curiam*); *Waldron v. United States, Ibid.*[1]

Entered by order of the Court:

JAMES A. HIGGINS,
Clerk.

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[1] We decline to consider in this case the suggestion made for the first time in appellant's reply brief in this court that the Selective Service Act is unconstitutional because it fails to draft women as well as men. This issue was not raised before the draft board nor before the District Court. *See United States v. Baird,* 427 F.2d 521 (6th Cir.), *cert. denied,* 400 U.S. 826 (1970).

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOEL S. WHETSTONE,

Defendant.

Criminal No. 47048

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

The defendant, Joel S. Whetstone, was indicted on April 5, 1972, for refusing to submit to induction into the Armed Forces on September 21, 1970 as directed by an order of his local board, in violation of Section 462, Title 50 Appendix, United States Code. The case was tried to the Court without a jury and is now before the Court on defendant's Motion for Judgment of Acquittal.

The relevant facts of the case which are undisputed follow. An order to report for induction was mailed to the defendant by his local board on December 24, 1969. The date originally set for induction was twice postponed by

the local board until September 21, 1970 to enable the defendant to complete law school and take the Michigan bar examination. Defendant filed a Form 150 which presented a *prima facie* conscientious objection claim on August 26, 1970, after he had taken the bar examination. On September 1, 1970 he was sent a notice which contained a date certain to report for induction—September 21, 1970. On September 8, the local board met and decided not to reopen Mr. Whetstone's classification. The defendant was then advised by letter that the board had considered the information submitted supporting the C. O. claim but had held that the information did not warrant a reopening.[1]

The defendant reported, but failed to submit to induction on September 21, 1970. The remainder of defendant's Selective Service file appears normal and is not challenged by the defendant.

The broad issue before the Court is whether the defendant's induction order was invalid because the local board improperly denied the conscientious objection claim. Two major arguments are presented. Defendant first asserts that the board *de facto* reopened his classification by reviewing letters supporting the C. O. claim which were submitted to the board by friends and associates. Thus, defendant asserts, due to the reopening, the induction order

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[1] The contents of the letter from the board to Mr. Whetstone reads as follows:

"Please be advised that SSS Form 150, Special Form for Conscientious Objector, and additional information presented on your behalf, was duly considered by the Local Board at their regular meeting held on Tuesday, September 8, 1970.

"It was the opinion of the board that the information presented held not to warrant reopening your case, and no change was made in your current status."

was invalid because defendant was not given rights to personal appearance or appeal as provided under 32 C. F. R. § 1625.4. Alternatively, defendant argues that his induction order was invalid because the board failed to state reasons supporting its refusal to reopen the classification.

The recent Supreme Court case of *Ehlert v. United States*, 402 U.S. 99 (1971), is the touchstone decision in the field of registrant's rights in post-notice of induction conscientious objection cases. The Court in *Ehlert* upheld Selective Service regulation § 1625.2[2] (in effect at all times relevant in this case) and further held that the Government interpretation of the regulation, requiring that any circumstances claimed to be beyond the control of the registrant be confined to "objectively identifiable" and "extraneous events and circumstances", (pp. 104, 105) was

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[2] Regulation 32 C.F.R. 1625.2, as in effect at all times here relevant reads as follows:

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. [E.O. 10594, 20 F.R. 740, Feb. 3, 1955]

proper. Approval of that interpretation, for the reasons delineated, forecloses local boards from considering post-notice crystallizing conscientious objection claims, and therefore, local boards may not reopen a registrant's classification when presented with such claims. See *United States v. Charles*, 460 F.2d 1093 (6th Cir. 1972); *Lane v. Local Board No. 17*, 445 F.2d 850 (1st Cir. 1971); *United States v. Steiner*, 469 F.2d 760 (5th Cir. 1972); *United States v. Jones*, 447 F.2d 589 (7th Cir. 1971); *United States v. Whalen*, 451 F.2d 755 (8th Cir. 1971); *United States v. Jercha*, 458 F.2d 1340 (9th Cir. 1972); *United States v. Kirkpatrick*, 446 F.2d 1371 (10th Cir. 1971).

In *Ehlert* the Supreme Court based its decision on the fact that a registrant is entitled to a post-induction review of a conscientious objection claim in the Army if the claim crystallized after the induction notice was mailed and the Selective Service System did not rule on the merits of the claim. The fact that a local board does not reopen the registrant's classification to hear the C. O. claim, therefore, does not foreclose his opportunity for a hearing.

Applying the *Ehlert* doctrine to the present case, since the Form 150 was filed after the defendant's induction order was mailed, the local board could not have reopened Mr. Whetstone's classification because there was no requisite change in circumstances over which the registrant had no control. § 1625.2. Since the local board was without power to reopen defendant's classification, there could have been no *de facto* reopening of his classification and defendant clearly was not entitled to a personal appearance or appeal. § 1625.4.

Turning to the second argument, defendant asserts that the failure of the local board to present reasons for not reopening would have permitted the Army to refuse to entertain an in-service C. O. claim because it might reasonably conclude that the Selective Service System had denied the claim before induction on its merits.[3] According to the defendant's argument, the language used by the local board in the present case in refusing to reopen Mr. Whetstone's classification is consistent with any of four interpretations:

(1) a board finding that Mr. Whetstone's beliefs were not sincere;

(2) a board finding that Mr. Whetstone's beliefs were sincere both before and after receipt of the induction notice and that there was, therefore, no change in status as required by regulation § 1625.2;

(3) a board finding that Mr. Whetstone's beliefs were not based on "religious training" as required by the Selective Service Act; or

(4) a board finding that Mr. Whetstone was not entitled to a reopening because crystallization of conscientious objection beliefs was not a circumstance over which the registrant had no control.

The defense continues by asserting that since Mr. Whetstone would be entitled to in-service review only if the local board based its decision on the fourth interpretation, the Army might reasonably conclude the Selective Service System had relied on one of the three other grounds in refusing to reopen, and, therefore, deny defendant a hearing

[3] Army regulations bar post-induction consideration of conscientious objection claims considered on the merits before induction by the Selective Service System. A.R. 635-20 ¶ (3)(b)(2). See also *Grubb v. Birdsong*, 452 F.2d 516 (6th Cir. 1971).

on the claim altogether. The resulting uncertainty would create the exact "no man's land" that the Supreme Court in *Ehlert* expressly said must be avoided. Two recent Third Circuit cases lend support to this analysis. That Court in *United States v. Shomock*, 462 F.2d 338 (3rd Cir. 1972), and *United States v. Ziskowski*, 465 F.2d 480 (3rd Cir. 1972), reversed convictions on fact situations similar to that in the instant case.

This Court believes that defendant's position improperly interprets the *Ehlert* decision as requiring reasons to be given by a local board in such circumstances. Since the effect of *Ehlert* was to require in-service review of all conscientious objection claims on the merits which crystallized after the mailing of the notice of induction.[4] Mr. Whetstone should properly have brought his C. O. claim after induction. Only if defendant's claimed beliefs had crystallized before the mailing of the notice to report for induction would defendant not be entitled to a hearing on the merits of his claim. Even then he would be entitled to an in-service determination as to when his beliefs crys-

[4] The following quotation from *Ehlert* supports this conclusion:

"We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Department of the Army to the Department of Justice, that present practice allows presentation of [post notice of induction] claims, and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims. Our conclusion in this case is based upon that assurance. For if, contrary to that assurance, a situation should arise in which neither the local board nor the military had made available a full opportunity to present a *prima facie* conscientious objection claim for determination under established criteria, see *Walsh v. United States*, supra, a wholly different case would be presented." (footnotes omitted.) 402 U.S. 99, 107.

tallized. See *Grubb v. Birdsong*, 452 F.2d 516 (6th Cir. 1971). Because the local board declined to reopen the defendant's file, it cannot be said to have considered the claim on its merits. The Army, therefore, could not reasonably conclude that the Selective Service System had considered the claim on its merits. If defendant's claim were not heard after induction, Mr. Whetstone could properly seek *habeas corpus* relief. Two other cases decided in this District have similarly held that a local board need not give reasons for not reopening the registrant's classification on post-notice C. O. claims. See *United States v. Thomas*, Cr. No. 45914 (decided June 26, 1972, Kennedy, J.), and *United States v. Stein*, Cr. No. 46719 (decided October 17, 1972, Kaess, C. J.).

The defendant's analysis concerning the so-called "reasons requirement" in cases where the local board does not reopen a registrant's classification such as presented here is based on a misconception of the holding in the leading cases discussing that requirement: *United States v. Haughton*, 413 F.2d 736 (9th Cir. 1969), *United States v. O'Bryan*, 450 F.2d 365 (6th Cir. 1971), and *Fein v. Selective Service System*, 405 U.S. 365 (1972). These cases have held that the System must state reasons for decisions by local and appeal boards to permit meaningful review by the System and Courts and to aid the registrant in preparing an appeal. This is not applicable to the present case because here the board could not reopen the classification and hear the claim on its merits. Since the Army would then be required to hear the C. O. claim after induction, defendant was in no way prejudiced by the failure of the local board to state reasons for not reopening and the *Haughton* principle would not be applicable.

For the above reasons, defendant's Motion for Judgment of Acquittal is, therefore, denied, and defendant is found guilty as charged in the indictment. Defendant is referred to the Probation Department for presentence investigation. Bond is continued pending sentence. Sentence is deferred until the further order of the Court.

PHILIP PRATT,
United States District Judge.

Dated: March 22, 1973.